Supreme Court, U. S.
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In The

Supreme Court of the United States

May Term 1979

No. 78-1643

JOSEPH MARCERA and JOHN DILLMAN, Individually and on behalf of all others similarly situated,

Respondents.

v.

STEPHEN CHINLUND, JOSEPH WASSER, and DOROTHY WADSWORTH, Individually and in their official capacities as members of the New York State Commission of Correction,

Respondents,

and

WILLIAM LOMBARD, Individually and in his official capacity as Sheriff of Monroe County and on behalf of all other persons similarly situated,

Petitioner.

PETITION FOR WRIT OF CERTIORARI

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Respondents,

and

WILLIAM LOMBARD, Individually and in his official capacity as Sheriff of Monroe County and on behalf of all other persons similarly situated,

Petitioner.

PETITION FOR WRIT OF CERTIORARI

The Petitioner, William Lombard, individually and in his official capacity as Sheriff of Monroe County and on behalf of other persons similarly situated, respectfully pray that a Writ of Certiorari be issued to review the judgment and opinion of the United State Court of Appeals for the Second Circuit, entered in this proceeding on February 27, 1979.

OPINIONS BELOW

On February 27, 1979, the United States Court of Appeals for the Second Circuit entered a judgment and order with opinion vacating a decision of the United States District Court for the Western District of New York and remanded this case with directions to certify both Plaintiff and Defendant classes and grant classwide preliminary relief. (Appendix C, pp. A14-A15)

The opinion of the United States District Court for the Western District of New York (Appendix B, pp. 1-10) entered the 5th day of June, 1978, has not been reported.

JURISDICTION

1. The Judgment of the United States Court of Appeals for this Second Circuit vacating and remanding the decision of the United States District Court for the Western District of New York was entered on the 27th day of February, 1979. (Appendix C, pp. A14-A15)

2. The jurisdiction of the Court is invoked under Title 28 of the United States Code, §1254(1), providing for the granting of a Writ of Certiorari upon the petition of any party after rendition of judgment by the Court of Appeals for the Second Circuit.

QUESTIONS PRESENTED

1. Has the Court of Appeals erred in holding that it is unconstitutional in the instant case not to provide a general program of contact visitation for pretrial detainees at the Monroe County Jail?

2. Has the Court of Appeals for the Second Circuit erred in vacating the decision of the United States Court of Appeals for the Western District of New York in overturning such decision's denial of statewide class certification for both Plaintiff and Defendant classes?

3. Has the Court of Appeals for the Second Circuit erred in vacating the decision of the United States District Court for the Western District of New York and further granting the preliminary relief requested by the Plaintiffs?

4. Has the Court of Appeals for the Second Circuit erred in failing to affirm the decision of the United States District Court for the Western District of New York, but reversing only as to the preliminary relief and class certification granted in such decision?

CONSTITUTIONAL PROVISIONS, STATUTES AND REGULATIONS INVOLVED

The provisions of the Constitutions, Statutes and Regulations which are relevant to the decision of this case, and the pertinent text of which is set forth in Appendix A hereto, are as follows:

1. Article XIV, §1 of the United States Constitution.
2. 42 U.S.C. §1983.
3. New York Codes, Rules and Regulations, §§7008.1 to .8.

STATEMENT OF FACTS

In November, 1976, following the promulgation of regulations by the State Corrections Commission requiring contact visitation in County Jail Facilities (9 N.Y. Codes, Rules and Regulations §§7008.1 to .8) which regulations had been stayed by state court injunction secured by forty-seven (47) of the respective New York County sheriffs, the Respondents, Joseph Marcera and John Dillman, then pretrial detainees at the Monroe County Jail (but subsequently convicted and incarcerated) commenced this federal court action against the Respondents, Chinlund, et al, and the Petitioner, William Lombard, individually and as Sheriff of Monroe County and on behalf of all persons similarly situated, seeking a declaratory judgment that refusal to grant a contact visitation

program* is a deprivation of rights secured by the Civil Rights Act, 42 USC §1983 and the Fourteenth Amendment of the United States Constitution, further seeking preliminary and permanent injunctions against the Repondents, Chinlund, et al, compelling contact visitation for the Plaintiff and seeking class certification for both the Plaintiff class of all pretrial detainees in County Jail facilities and a Defendant class of all New York sheriffs under Rule 23(b)(1)(2) of the Federal Rules of Civil Procedure. The Respondent, Chinlund, et al, and Petitioner, Lombard, et al, answered such complaints and further opposed such relief on a variety of legal and factual grounds. Respondents, Marcera, et al, moved for class certification and preliminary injunctive relief and Petitioner Lombard vigorously opposed such motion and refused to represent the proposed Defendant class. The Honorable Harold Burke denied all relief sought by the Respondents, Marcera, et al, and after appeal, the Court of Appeals for the 2d Circuit reversed (Marcera v. Chinlund, 565 F.2d 253 [1977]) and directed that a fact finding hearing be held. After such hearing was held, Judge Burke determined that Respondents, Marcera, et al, had demonstrated neither irreparable injury nor likelihood of success on the merits. (See Appendix B, pp. A7-A13)

In addition, Judge Burke found significant difference in jail conditions, staffing, inmate population, the unique nature of the Monroe County Jail and further found that Petitioner Lombard and the institution he is responsible for, is not representative of all sheriffs and facilities in New York State and such Petitioner is not authorized by law nor does he purport in fact to represent

*Note: The Monroe County Jail does have contact visitation on a limited basis. Lawyers, Clergy and other Professionals have unlimited private access to inmates. In addition, under special circumstances, prisoners can have contact visits (i.e. Prisoner Shaw, who testified at the hearing before Judge Burke, was married in the Monroe County Jail). Despite this, neither Judge Burke's decision nor the 2d Circuit Opinion has referred to same.

same. Therefore, Judge Burke denied Defendant class certification. (See Appendix B, p. A13)

He further denied statewide class certification of Plaintiffs based on a lack of adequate familiarity with New York jails other than Monroe County and a lack of authority of Plaintiffs' counsel to legally represent statewide Plaintiffs, but did grant class certification as to pretrial detainees and sentenced offenders in the Monroe County Jail. Judge Burke further ordered Sheriff Lombard to prepare a cost estimate of providing such contact visitation for all inmates of the Monroe County Jail and submit such plan to the Monroe County Legislation with a statement that such a program is required by law.

The Respondents, Marcera, et al, appealed to the 2d Circuit the denials of statewide certification and the refusal to enter a more comprehensive preliminary injunction. The Sheriff cross-appealed the directive of Judge Burke.

The Court of Appeals of the Second Circuit in a divided opinion (See Appendix C, pp. A14-A44) vacated the preliminary injunction and Plaintiff class certification and remanded with directions to certify the Plaintiff and Defendant statewide classes requested by Plaintiffs and grant classwide preliminary relief.

REASONS FOR GRANTING THE WRIT

I

This case merits review by this Court on Certiorari because this Court needs to settle the question whether contact visits are mandated by the Federal Constitution in local jails for pretrial detainees.

The divided Court below has decreed that, "... since 1974, we have repeatedly held that due process forbids denying detainees the right 'to shake hands with a friend, to kiss a wife or to fondle a child' ", citing *Rhem v. Malcolm*, 371 F. Supp. 594, aff'd 507 F. 2d 333; *Wolfish v. Levi*, 573 F. 2d 118, cert. granted, sub nom.; *Bell v. Wolfish*, 99 S.Ct. 76 (1978); *Rhem v. Malcolm*, 527 F.2d 1041. (See Appendix C, p. A16)

The standard set for the limitations on pretrial detainees is that they, "... may be subjected to only those restrictions and privations which inhere in their confinement itself or which are justified by compelling necessities of jail administration." *Wolfish v. Levi*, supra at p. 124. See also *Detainees of Brooklyn House of Detention for Men v. Malcolm*, 520 F.2d 392.

Nor can any deprivation of these "contact visitation" rights be justified on either cost, *Todaro v. Ward*, 565 F.2d 48, nor administrative convenience, *Estelle v. Williams*, 425 US 501. (But see *Ambrose v. Malcolm*, 440 F. Supp. 51).

Yet as the dissent of Judge VanGraafeiland points out:

> "It seems to me that, before we set the district judge to the formidable task of restructuring jails in forty-three* counties, we should first define clearly and explicitly the nature of the legal right upon which this extraordinary relief is based. A class action to enforce an undefined and indefinite right is a waste of judicial manpower and taxpayers' money. My brothers should start by stating exactly what they mean by the term "contact visit."
>
> This Court has firmly committed itself to the proposition that pretrial detainees have a constitutional right to "contact visits", without ever really stating how much contact there must be in such visits to satisfy the mandate of the Constitution ..." (See Appendix C, p. A40)

*Note: While originally the Defendant class was forty-three by stipulated order in the case of *Merriweather v. Sherwood*, No. C.A. 77-3421 (E.W.), 36-39 (S.D.N.Y. Oct. 27, 1978), the class has been reduced to 42. (See Appendix D, pp. A45-A46)

Indeed the standard enumerated by the Second Circuit in this case flies in the face of the well worn rule that:

> "... Courts are ill-equiped to deal with the increasingly urgent problems of prison administration and reform. Judicial recognition of that fact reflects no more than a healthy sense of realism." *Procunier v. Martinez*, 416 US 396, at p. 405.

Before the Courts should enumerate such a vague standard for contact visits as set forth in this case, they must answer the overriding question: does the practice or condition violate the Constitution? *Jones v. North Carolina Prisoners' Labor Union*, 433 U.S. 119 at p. 124. While the Court below answers "yes", it never really explains how such denial of contact visits violates the due process clause of the Fourteenth Amendment.

This is important since this constitutional right to contact visits has just recently sprung up and since the Court is now clearly mandating a special level of privilege to pretrial detainees. *Dillard v. Pitchers*, 399 F.Supp. 1225.

The rationale of the Second Circuit apparently centers on a misconception of the legal status of a pretrial detainee. The Court below relies on the presumption of innocence but that presumption long ago defined in *Coffin v. U.S.*, (1895) 156 U.S. 432 at p. 459 as, "... an instrument of proof created by law in favor of the accused." In short, it is procedural, an element of proof not a statement of reality.

The logical extension of the Court below's misconception is that because a man is presumed innocent, he cannot be treated in any way like a convicted prisoner, in short not even confined. Indeed as Judge VanGraafeiland points out:

> ". . . The unincarcerated man has, of course, the right to 'kiss a wife or to fondle a child.' But he has more than that. He has the right to kiss a child and to fondle a wife, and he has the right to do so in privacy. See *Griswold v. Connecticut*, 381 U.S. 479 (1965). Do our forceful statements mean that a presumptively innocent pretrial detainee is entitled to the same conjugal "contact" rights that he would enjoy were he not incarcerated, so long as the exercise of these rights does not cause a breach in jail security? If, as we hold, pretrial detainees retain 'all the rights of an ordinary citizen except the right to go and come as they please', *Rhem v. Malcolm*, supra, 507 F.2d at 337 (quoting *Jones v. Wittenberg*, 323 F.Supp. 93, 100 (N.D. Ohio 1971), aff'd sub nom. *Jones v. Metzger*, 456 F.2d 854 (6th Cir. 1972)), can the private and intimate contact rights of ordinary citizens be taken from the detainees without a compelling security reason? . . ." (See Appendix C, p. A41)

The stated rule, however, is that:

> " 'lawful incarceration brings about the necessary withdrawal or limitation of many privileges and rights, a retraction justified by the consideration underlying our penal system. *Price v. Johnston*, 334 U.S. 266, 285 (1948); see also *Pell v. Procunier*, 417 U.S. 817, 822 (1974); *Wolff v. McDonnell*, 418 U.S. 539, 555 (1974). The fact of confinement and the needs of the penal institution impose limitations on constitutional rights' (*Jones v. North Carolina Prisoners' Union* 433 U.S. 119, 125)." *Cooper, et al. v. Lombard, et al.*, 64 A.D. 2d 130 (Sept. 15, 1978) at p. 134; 409 NYS2d 30 at p. 32 (4th Dept. 1978).

Obviously, the rules as set forth by the Second Circuit below in the instant case represents a clear and dangerous intrusion of the courts into the operation and needs of prison administration and security. Again the Court points out:

> "It has been repeatedly held that the courts should defer to the discretion of correction officials in matters concerning prison administration and the needs of institutional security (see, e.g. *Meachum v. Fano*, 427 U.S. 215, 228-229; *Preiser v. Rodriguez*, 411 U.S. 475, 491-492; *Cruz v. Beto*, 405 U.S. 319, 321; *Johnson v. Avery*, 393 U.S. 483, 486; *Wilkinson v. Skinner*, 34 N.Y.2d 53, 62)." *Cooper, et al. v. Lombard, et al.*, supra at p. 134; at p. 32.

II

This case merits review by this Court on Certiorari because the decision of the Court of Appeals has the effect of undermining the very clear rule of this Court not to review non-appealable orders nor to overturn the ruling of a trial judge with regard to class certification in advance of trial.

As Judge VanGraafeiland points out in a warning ignored by the majority below:

> "At the outset, I question whether this Court should become involved in the matter of class certification at the present time. During the past year, the Supreme Court has held that the rule denying the appealability of class certification orders should not be circumvented by allowing review under the "death knell" doctrine, *Coopers & Lybrand v. Livesay,* 46 U.S.L.W. 4757 (June 21, 1978), or by equating the denial of certification with the denial of interlocutory injunctive relief. *Gardner v. Westinghouse Broadcasting Co.,* 46 U.S.L.W. 4761 (June 21, 1978). It is equally important, I believe, that the rule not be emansculated by the simple device of coupling every request for class certification with a motion for preliminary injunctive relief under the doctrine of pendent jurisdiction when the appeal from the preliminary injunction order comes up as a matter of right under 28 U.S.C. §1292(a)(1)." (See Appendix C, p. A38)

The majority on the Court of Appeals has chosen to arbitrarily overturn the factual findings of Judge Burke, the trial judge, on such non-appealable matters as class certification and the appropriateness of preliminary relief as well as the findings of fact made by the trial judge below. The firmly established rule is that the determination of whether an action should proceed as a class action, "is one which is peculiarly within the discretion of the trial judge", *Becker v. Schenley Industries, Inc.,* 557 F.2d 345, 348, (2d Cir. 1977), and that the trial judge's findings of fact should not be overruled unless clearly erroneous. *Palermo v. Warden,* 545 F.2d 286, 293 (2d Cir. 1976), cert. dismissed, 431 U.S. 911 (1977). (See Appendix C, p. A39)

If it was the intention of the Second Circuit to mandate class certification and preliminary relief in the instant case regardless of the determination of the trial judge below, they most certainly wasted a great deal of judicial time in earlier reversing and mandating a fact finding hearing, *Marcera v. Chinlund,* supra, when in reality it was their intention to ignore the results of same and usurp the power of the trial judge in any event. The arguments raised at that initial hearing and the factual circumstances admitted at the time of that initial argument were not changed in the least by the subsequent fact finding hearing held before the Honorable Justice Burke below. Indeed at the time of the first reversal, the Court indicated its predisposition toward class certification of the Plaintiff class in Monroe County, but were silent as to Defendant class certification. Judge Burke in his findings of fact (See Appendix B, pp. A7-A13) specifically delineates the factual circumstances of the instant case and analyses these facts against the requirements of Rule 23 of the Federal Rules of the Civil Procedure, and yet the Second Circuit chose to ignore such findings in whole without delineating the clear abuse of Judge Burke for such pendent jurisdiction review.

It thus appears that the Second Circuit has established a rule that a Defendant class may be put in jeopardy required to yield preliminary relief without regard to "cost or administrative convenience", without ever having been afforded notice of such jeopardy, opportunity to be represented, nor any opportunity to even present an argument or be afforded a hearing before any judge or Court. The gross unfairness and obvious Constitutional violation of such a procedure is cavalierly disregarded by the Second Circuit in a mere footnote in the decision below. (See Appendix C, p. A29). Given the comparatively few contact visitation cases, it is hard to imagine how the Second Circuit could have gleaned the speculative conclusion that the defense of Sheriff Lombard admittedly limited to the County of Monroe is, by law and in fact, typical of all Defendant/Sheriffs in New York State. (See Appendix C, p. A24)

The rulings of the Second Circuit with regard to contact visitation and their interpretation of the role of Federal Courts in the administration of local jails is inconsistent with the rulings of other Federal Courts of Appeal. *Royal v. Clark*, 447 F.2d 501, (5th Cir. 1971); *Qxendine v. Williams*, 509 F.2d 1405 (4th Cir. 1975); *Padgett v. Stein*, 406 F.Supp. 287, (N.D. Pa. 1975); *McCray v. Sullivan*, 509 F.2d 1332 (5th Cir. 1975).

It thus appears that there is an inconsistency between the Second Circuit and the other Federal Circuit Courts of Appeal with regard to both contact visitation and Federal procedure. Only the direct intervention of this Court can correct these inconsistencies and finally define Federal law in this area.

CONCLUSION

For the reasons above stated, the Petition for Writ of Certiorari should be granted.

Respectfully submitted,

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Appendices

APPENDIX A
Constitutional Provisions, Statutes and Regulations

U.S. CONSTITUTION

1. Article XIV, §1 of the United States Constitution:

Citizenship defined; privileges of citizens — All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

U.S. STATUTES

2. 42 U.S.C. §1983:

Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory, subjects or causes to be subjected, any citizen of the United States or other persons within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity or other property proceedings for redress.

NEW YORK STATE STATUTES

3. New York Codes, Rules and Regulations, §§7008.1 to .8

7008.1 Policy.

(a) All prisoners confined to local correctional facilities are entitled to receive periodic visits.

(b) Consistent with the requirements of this Part, visits shall be permitted upon the request of a prisoner or a prospective visitor with the prisoner's consent.

7008.2 Visiting area.

(a) A visiting area of sufficient size to meet the requirements of this Part shall be established and maintained in each facility.

(b) The visiting area shall be designed so as to allow physical contact between prisoners and their visitors.

7008.3 Availability of visits.

(a) Each prisoner shall be entitled to at least two one hour visits each week.

(b) At least one visit each week shall be available to each prisoner between the hours of 9 a.m. to 5 p.m. on a weekday.

(c) At least one visit each week shall be available to each prisoner:

(1) between the hours of 5 p.m. and 9 p.m. on a weekday; or

(2) on a Saturday or Sunday at times not unduly disruptive of facility routine.

(d) Prisoners shall be permitted to visit with more than one visitor at the same time, with the maximum number of visitors to be determine by the chief administrative officer.

(e) Visitors shall be permitted to visit with more than one prisoner at the same time with the maximum number of prisoners to be determined by the chief administrative officer.

7008.4 Initial visit.

(a) Each prisoner shall be entitled to receive a visit within 24 hours after his admission to a facility.

(b) If a visiting period scheduled pursuant to subdivision (b) and (c) of section 7008.3 of this Part is not available within 24 hours after a prisoner's admission, arrangements shall be made to ensure that the initial visit required by subdivision (a) of this section is made available.

7008.5 Visitor identification and registration.

(a) Consistent with the requirements of this Part, any properly identified person shall, with the prisoner's consent, be permitted to visit that prisoner.

(b) As used in this section, the term "properly identified person" shall mean a person who presents adequate proof as to his identity.

(c) Each visitor shall be required to enter in a facility visitors log:

(1) his name;
(2) his address;
(3) the date;
(4) the time of entry;
(5) the name of the prisoner or prisoners to be visited; and
(6) the time of exit.

(d) Any prospective visitor who is under 16 years of age shall be required to enter in the facility visitors log:

(1) the information required in subdivision (c) of this section;
(2) his age; and
(3) the name, address, and telephone number of his parents or legal guardian.

(e) Prior to visiting a prisoner, a prospective visitor under 16 years of age may be required by the chief administrative officer to produce written permission from a parent or legal guardian approving such visit. In the discretion of the chief administrative officer, oral permission from a parent or legal guardian of a prospective visitor under 16 years of age may be accepted.

7008.6 Contact visits.

(a) Physical contact shall be permitted between a prisoner and his visitors.

(b) Prisoners and their visitors shall be required to conduct themselves in a manner consistent with reasonable standards of public decency.

7008.7 Visitation security and supervision.

(a) All prisoners, prior and subsequent to each visit, may be searched solely to ensure that they possess no contraband.

(b) All prospective visitors may be searched solely to ensure that they possess no contraband.

(c) Any body search of a prospective visitor made pursuant to subdivision (b) of this section shall be conducted only through the use of electronic detection devices.

(d) Personal effects, including but not limited to handbags or packages possessed by any prospective visitor, shall be searched or checked with the visiting area supervising officer.

(e) A search of the visiting area shall be conducted prior and subsequent to each visiting period.

(f) Supervision shall be provided during visits solely to ensure that the safety, security or good order of the facility is maintained.

(g) Supervision of visits shall not include any surreptitious surveillance.

7008.8 Limitation of visitation rights.

(a) Visitation rights shall not be denied, revoked, or limited based solely upon a prisoner's or prespective visitor's:

(1) Sex;
(2) sexual orientation;
(3) race;
(4) age, except as otherwise provided in this Part;
(5) nationality;
(6) political beliefs;
(7) religion;
(8) criminal record; or
(9) the prespective visitor's involvement in any pending civil or criminal proceeding.

(b) The visitation rights of a prisoner with a particular visitor may be denied, revoked or limited only when it is determined that the exercise of those rights constitutes a threat to the safety, security or good order of a facility.

(c) A prisoner's right to contact visits as provided in section 7008.6 of this Part may be denied, revoked, or limited only when it is determined that such visits constitute a threat to the safety, security or good order of a facility. Should a determination be made to deny, revoke or limit a prisoner's right to contact visits, alternative arrangements for affording the prisoner visits shall be made, including but not limited to non-contact visits.

(d) A prisoner's visitation rights as provided for in sections 7008.3 and 7008.4 of this Part may be denied, revoked or limited in an emergency situation. Within 24 hours after any denial, revocation or limitation made pursuant to this subdivision, the

chief administrative officer must apply to and obtain the approval of the State Commission of Correction to continue such action.

(e) The provisions of Part 7006 of this Subtitle [Discipline] shall apply prior to any determination made pursuant to subdivisions (b) and (c) of this section.

(f) Any determination to deny, revoke or limit a prisoner's vistation rights pursuant to subdivisions (b) and (c) of this section shall be made by the chief administrative officer in writing and shall state the specific facts and reasons underlying such determination. A copy of this determination shall be given to any person affected by the determination.

(g) Any person affected by a determination made pursuant to subdivisions (b) and (c) of this section may appeal such determination to the citizens policy and complaint review council of the State Commission of Correction.

(1) The person affected by the determination shall give notice in writing to the council and the chief administrative officer of his intent to appeal the determination.

(2) Upon receiving any notice of appeal made pursuant to this section, the chief administrative officer shall immediately forward to the council the written determination at issue.

(3) The chief administrative officer or any person affected by the determination may submit to the council for their consideration any additional material.

(4) The council or its designate shall issue a written decition upon the appeal within 14 days after they have received notice of the requested review.

APPENDIX B

Opinion of United States District Court Western District of New York

UNITED STATES DISTRICT COURT WESTERN DISTRICT OF NEW YORK

JOSEPH MARCERA and JOHN DILLMAN, Individually and on behalf of all others similarly situated,

Plaintiffs,

—vs—

STEPHEN CHINLUND, JOSEPH WASSER and DOROTHY WADSWORTH, Individually and in their official capacities as members of the New York State Commission of Correction, and WILLIAM LOMBARD, Individually and in his official capacity as Sheriff of Monroe County and on behalf of all other persons similarly situated,

Defendants.

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Hearing before the undersigned at Rochester, New York, March 13-14, 1978 on motion for preliminary injunction and for certification of a plaintiffs' class and for certification of a defendants' class.

FINDINGS OF FACT

1. This is an action seeking a preliminary injunction requiring the defendants to submit a plan as to how to implement contact visitation for pre-trial detainees in New York State Jails.

2. The defendant Lombard, Sheriff of Monroe County, is a constitutional officer under the New York State Constitution. He was elected to office for a term of three years. Under the county law the Sheriff has certain responsibilities in carrying out his constitutional office. He does not have the power to levy taxes nor the power to raise revenue for any of the purposes of the office. He relies on the financial resources of the County government to carry out the function of his office. Monroe County Legislature appropriates sufficient funds in its annual county budget to pay the costs of the Sheriff's office and any other expenses that the Sheriff may incur. The Sheriff of Monroe County and the other sheriffs of New York under the provisions of the New York State Correctional Law, Section 500c and County Law, Section 217, vest in the sheriff the duty to maintain and control the county jail and custody of the inmates. Funds for this function and responsibility are also provided by the County Legislature in its annual appropriation of funds. Plaintiffs ask this court to certify this action as a class action, both with respect to the class of plaintiffs and defendants. The plaintiffs have sued defendant Lombard as representative of a defendant class of county sheriffs in New York who are responsible for the care of those who are pre-trial detainees in jails which do not provide contact visits and who have not been involved in an action seeking similar relief.

3. Each defendant sheriff sought to be included within the class has the authority and responsibility of a jail facility under the provisions of the State Correction Law and the county law. Each jail facility differs substantially in terms of its physical

aspects, location in the community, staffing patterns and population, amongst many other differences. The funds to maintain and operate such facilities are also individually determined by each legislature body of each county in which such sheriffs are elected. These differences and distinctions between such facilities raise many different issues of fact. The availability of funding to various degrees in the operation of each jail facility vary substantially based on a wide degree of factors relating to each facility.

4. The defendant Lombard is legally responsible solely for the operation of the Monroe County Jail. He does not in any way represent any of the other sheriffs of the State of New York. He does not have any control over or experience with such other jail facilities. There has been no showing of irreparable injury with respect to the subject of contact visitation or its denial to the plaintiffs or the class they purport to represent. There has been no formal studies with regard to the advantages of contact visitation or to the respective cost and financial burdens to be borne by the County of Monroe should a formal contact visitation be implemented. There is no showing of likelihood of success on the merits of plaintiffs' claims.

5. The plaintiffs seek to establish that the alleged forty jail facilities operated by forty different sheriffs throughout the State of New York have common factual problems and similar physical characteristics that such implementation of a formal contact visitation program would be comparatively simple. The physical characteristics problem of security and staffing as well as the demands on the facility and the beneficial programs available at each jail facility vary substantially. The treatment of prisoners and their complaints vary. The Monroe County Jail is among the most modern and well run jail facility in the State of New York.

6. The Monroe County Jail was originally constructed in 1960 as a maximum security facility. It has an average daily population of about 350 persons. It is located within the Rochester metropolitan area and is a depository for both pre-trial detainees who make up approximately two-thirds of the average prisoner population and sentenced persons for up to one year who make up the remaining jail population. The facility is used by eleven separate police agencies within the County of Monroe. The jail facility is unique within the State of New York both as to physical plant facilities, prisoner population and practical operating procedures when compared to other jail facilities.

7. Because of the substantial differences, the defendant Lombard and the institution for which he is responsible is not representative of all of the sheriffs and all of the facilities within the State of New York. The defendant Lombard is not authorized by law nor does he purport in fact to represent such other sheriffs and other facilities.

8. The defendant Lombard and his jail administration have roughly estimated that the cost of a formal contact visitation program as sought by the plaintiffs would entail an expenditure by the County of Monroe of in excess of $750,000.00, $500,000.00 of which would be directly related to the cost of personnel and daily operation of such jail facility which would be a continuing and increasing cost.

9. Defendant Lombard is limited to the appropriations granted him and the jail by the Monroe County Legislature. He is unable on his own volition to provide the funds for implementation of such program and capitol construction without such funding. There is no showing that the defendant Lombard is required to act in any particular manner nor that his actions in any way harm the plaintiffs or other purported class of plaintiffs.

10. The public officers and governing bodies of the respective municipalities as well as the government officials of such political subdivisions of the State of New York are necessary and indispensable parties in this action.

11. On June 21, 1977 this court initially denied plaintiffs' motion for preliminary relief and class certification as to a defendant class. On November 10, 1977 the Court of Appeals for the Second Circuit reversed and remanded the action to this court with direction that a fact finding hearing be held.

12. The Monroe County Jail does not allow pre-trial detainees to have contact visitation. Visitation in the mens section is conducted by means of sixteen booths which consist of a wall of twelve unenclosed booths and four enclosed booths. There are two additional unenclosed booths which are used for visits of newly arrived pre-trial detainees and of pre-trail detainees and sentenced inmates who cannot be appropriately mixed with other prisoners receiving visits. Each unenclosed booth consists of two partitions partially protruding from a ceiling high, opaque, removable wall. Between the partitions approximately five feet off the floor are transparent plexiglass square windows about 24" by 24". The visit is conducted by means of a telephone on the prisoners side of the wall and one on the visitors side of the wall. The visiting area on both sides of the wall is noisy and it is difficult to hear the conversations. During a visit, both parties must stand as there are no fixtures for sitting. Pre-trial detainees cannot touch, hug or kiss their visitors whatsoever. This type of visiting area is commonly in use in those facilities in New York which house pre-trial detainees and do not allow contact visitation, except that sometimes a screen may substitute for a glass window.

13. At the end of 1976, there were 2381 pre-trial detainees in the fifty-seven county jails of New York. Currently forty-three of

those facilities deny contact visitations. The population of pre-trial detainees at those jails currently denying contact visitation was over 1400 on December 31, 1976.

14. There are forty-seven county jails in New York State housing pre-trial detainees denying contact visitation. Of the aforesaid county jails, four are the subject of litigation involving contact visitation.

15. The proposed defendant class consists of forty-three sheriffs in the following counties who have county jail facilities which do not allow contact visitation and are not currently in litigation regarding that issue: Albany, Oneida, Rensselaer, Montgomery, St. Lawrence, Jefferson, Warren, Franklin, Clinton, Columbia, Greene, Herkimer, Fulton, Essex, Lewis, Schoharre, Hamilton, Monroe, Onondaga, Niagara, Oswego, Orleans, Ontario, Cayuga, Madison, Wayne, Seneca, Livingston, Genesee, Cortland, Wyoming, Yates, Orange, Sullivan, Cattaraugus, Rockland, Steuben, Tompkins, Delaware, Schuyler, Otsego, Chenango and Putnam.

16. The proposed class of plaintiffs is represented in this action by David W. Beier and Ian DeWaal who are employees of the Monroe County Legal Assistance Corporation. There is no showing that they have any familiarity with any jail facility conducted by the sheriffs of New York State except the Monroe County Jail. The proposed class would not be adequately represented in this action by those attorneys. I have serious doubt that they are legally authorized to represent pre-trial detainees scattered throughout the State of New York.

17. The defendant Lombard has no familiarity with the jail facilities of any county in New York State except the Monroe County Jail; neither he nor his attorneys in this proceeding would adequately represent the sheriffs of New York State in this action. He has no legal authority to represent the sheriffs of New York State in this action.

CONCLUSIONS OF LAW

1. I delineate the class to be represented by plaintiffs as pre-trial detainees and sentenced offenders confined in the Monroe County Jail.

2. I decline to designate a class of defendants.

3. The action will continue as a class action limiting the plaintiff class to be pre-trial detainees and sentenced detainees confined in the Monroe County Jail against the named defendants striking out "and on behalf of all other persons similarly situated."

IT IS HEREBY ORDERED, pending the trial of this action, that William Lombard as Sheriff of Monroe County is directed to submit in writing to the County Manager of Monroe County the best estimate, within his power to estimate, of the cost of providing contact visitation for pre-trial detainees and sentenced detainees in the Monroe County Jail facility and to request that the County Manager submit such estimate to the Monroe County Legislature with a statement that the program of contact visitation for pre-trial detainees and sentenced detainees confined in the Monroe County Jail is required by law together with a request that the Monroe County Legislature make such appropriation.

/s/ HAROLD P. BURKE
Harold P. Burke
United States District Judge

June 5, 1978.

APPENDIX C
Opinion of United States Court of Appeals For The Second Circuit

UNITED STATES COURT OF APPEALS

FOR THE SECOND CIRCUIT

Nos. 359, 360—August Term, 1978.

(Argued December 6, 1978 Decided February 27, 1979.)

Docket Nos. 78-2081, 78-2090

JOSEPH MARCERA and JOHN DILLMAN,
Individually and on behalf of all others similarly situated,

Plaintiffs-Appellants-Cross-Appellees,

—v.—

STEPHEN CHINLUND, JOSEPH WASSER, and DOROTHY WADSWORTH, Individually and in their official capacities as members of the New York State Commission of Correction,

Defendants-Appellees,

—and—

WILLIAM LOMBARD, Individually and in his official capacity as Sheriff of Monroe County and on behalf of all other persons similarly situated,

Defendant-Appellee-Cross-Appellant.

Before:

KAUFMAN, *Chief Judge,*
SMITH and VAN GRAAFEILAND, *Circuit Judges.*

Appendix C — Opinion of United States Court of Appeals For The Second Circuit

Appeal and cross-appeal from an order entered in the United States District Court for the Western District of New York, Harold P. Burke, *District Judge,* denying plaintiffs' motion for certification of a defendant class, and granting in part and denying in part plaintiffs' motions for preliminary injunctive relief and certification of a plaintiff class.

The preliminary injunction and plaintiff class certification are vacated, and the cause is remanded with directions to certify the plaintiff and defendant classes requested by plaintiffs and grant classwide preliminary relief.

IAN C. DEWAAL, Rochester, N.Y. (Monroe County Legal Assistance Corp., Rochester, N.Y., of counsel), *for Plaintiffs-Appellants-Cross-Appellees.*

PATRICIA J. ARMSTRONG, Department of Law of the State of New York, New York City (Louis J. Lefkowitz, Attorney General of the State of New York, of counsel), *for Defendants-Appellees Chinlund, Wasser, and Wadsworth.*

JOSEPH C. PILATO, Rochester, N.Y. (John D. Doyle, County Attorney, Rochester, N.Y., of counsel), *for Defendant-Appellee-Cross-Appellant Lombard.*

KAUFMAN, *Chief Judge:*

Recent years have witnessed an explosion of litigation testing the rights of prisoners who have not been con-

victed of a crime but are merely held in custody to ensure their attendance at trial. A recurrent issue has been the extent to which these pretrial detainees must be permitted "contact visits," and, since 1974, we have repeatedly held that due process forbids denying detainees the right "to shake hands with a friend, to kiss a wife, or to fondle a child," *Rhem v. Malcolm ("Rhem I")*, 371 F. Supp. 594, 626 (S.D.N.Y.), *aff'd*, 507 F.2d 333 (2d Cir. 1974). *Accord, Wolfish v. Levi*, 573 F.2d 118, 126 n.16 (2d Cir.) (recognizing First Amendment basis to right), *cert. granted*, 99 S. Ct. 76 (1978) (No. 77-1829); *Rhem v. Malcolm ("Rhem II")*, 527 F.2d 1041, 1043 (2d Cir. 1975).

Before the instant litigation, however, the cases have focused on one institution at a time, and our decrees have had a practical impact only on the inmates of the particular facility under consideration in each suit. Thus, the sheriffs of 47 of New York's 62 counties continue to deny pretrial detainees in their custody[1] the contact with friends and loved ones that *Rhem I* established as their due. At Monroe County Jail, for example, which was built in 1970 and is considered one of the most modern jails in the state, the detainee and his visitor are kept apart by a ceiling-high wall. They see each other only through a small plexiglass window, and they talk by telephone. The visiting facilities at the other 46 jails whose inmates are denied contact visits are similar.

New York State officials have not been unmoved by the plight of the detainees in the county jails. In 1976, following our decisions in *Rhem I* and *Rhem II*, the State Corrections Commission promulgated regulations requiring each facility to adopt a contact visitation program. 9 N.Y.

1 Under N.Y. Correction Law § 500-c (McKinney Supp. 1978), the sheriff is responsible for the custody of pretrial detainees in every county except Westchester and the five in New York City.

Codes, Rules & Regs. §§ 7008.1 to .8 (1976).[2] The sheriffs, however, viewed this action by the Commission as infringing on their prerogatives as administrators of the jails, and they secured a state court injunction against enforcement of the regulations. *McNulty v. Chinlund*, 62 App. Div. 2d 682, 406 N.Y.S.2d 558 (3d Dep't 1978), *aff'g* 89 Misc. 2d 713, 392 N.Y.S.2d 790 (Sup. Ct., Albany Co. 1977).[3]

In November 1976, shortly after the Corrections Commission's regulations were promulgated, Joseph Marcera and John Dillman, two inmates of the Monroe County Jail, commenced this action to enforce their right to contact visitation. Seeking the broadest possible vindication of this right, they sought to maintain the suit as a double-edged class action under Rule 23 of the *Federal Rules of Civil Procedure*. Specifically, on behalf of themselves and a plaintiff class of pretrial detainees throughout the state, they sought relief against a defendant class of 43 sheriffs who deny contact visits in their jails.[4] Sheriff

2 These regulations are reprinted in the Appendix to this opinion.

3 The Appellate Division decided that although the regulations were within the scope of the Commission's authority, 406 N.Y.S.2d at 559-60, there was a reasonable probability that they would create sufficient costs and hazards to security to render them in conflict with the statutory duties of the sheriffs regarding safekeeping of prisoners, *id.* at 561. The state court did not address any federal constitutional issues.

4 The class was defined to include those counties that neither permit contact visitation nor are the subject of pending litigation seeking to require them to do so. These counties are: Albany, Oneida, Rensselaer, Montgomery, St. Lawrence, Jefferson, Warren, Franklin, Clinton, Columbia, Greene, Herkimer, Fulton, Essex, Lewis, Schohaire, Hamilton, Monroe, Onondaga, Niagara, Oswego, Orleans, Ontario, Cayuga, Madison, Wayne, Seneca, Livingston, Genesee, Cortland, Wyoming, Yates, Orange, Sullivan, Cattaraugus, Rockland, Steuben, Tompkins, Delaware, Schuyler, Otsego, Chenango, and Putnam.

William Lombard of Monroe County was named as representative of the proposed defendant class.[5] Plaintiffs promptly moved before Judge Burke for certification of plaintiff and defendant classes, and they also requested preliminary injunctive relief to facilitate implementation of contact visitation at the 43 affected jails.

On a prior appeal, we held that Judge Burke erred in denying the relief sought out of hand, without holding a hearing. *Marcera v. Chinlund,* 565 F.2d 253 (2d Cir. 1977) (*per curiam*). Although we stated that plaintiffs had raised "substantial claims of deprivations of [constitutional] rights," the virtually nonexistent record precluded us from ruling on the merits. *Id.* at 255. After the required hearing, the district judge determined that plaintiffs had demonstrated neither irreparable injury nor likelihood of success on the merits. In addition, he found that significant differences in jail construction, staffing, and inmate population among the 43 counties precluded Sheriff Lombard from adequately protecting the interests of the absentee defendants. Judge Burke therefore declined to certify either a defendant class or a statewide

5 The other defendants are Stephen Chinlund, Joseph Wasser, and Dorothy Wadsworth, who were respectively Chairman and Members of the State Corrections Commission at the time the suit was commenced. The complaint sought to direct these defendants to implement contact visitation throughout the state, but the possibility of such relief has been aborted by the *McNulty* action. It would be both unseemly and a possible violation of the Anti-Injunction Act, 28 U.S.C. § 2283, for a federal court to require the commissioners to do that which a state court has forbidden. In view of our holding in Part I *infra* that possible expenditures required to implement contact visitation are not relevant constitutional considerations, the Appellate Division may be inclined to reconsider and modify its decree. *Cf.* note 3 *supra*. That is, of course, a determination to be made by that court, and we will not require the commissioners to act inconsistently with the state court's injunction.

plaintiff class,[6] and he denied most of the requested preliminary relief. He did, however, certify a plaintiff class consisting of Monroe County inmates, and he ordered Sheriff Lombard to ask the County Legislature for funds with which to implement a contact visitation program.[7]

The sheriff appeals this directive, and plaintiffs appeal the denials of statewide class certification[8] and the refusal to enter a more comprehensive preliminary injunction. Because we believe the district judge has misconceived both the nature of the constitutional issues and the appropriate procedural response, we reverse the order

6 By "statewide class," of course, we refer to those pretrial detainees held in the jails of the 43 counties listed in note 4 *supra*.

7 In addition, Judge Burke found that the county legislators were indispensable parties because any relief would require appropriation of funds. This was error. Federal courts will not, except in the most extreme circumstances, direct state officials to raise or spend money, but will simply enjoin continuation of unconstitutional acts. *Rhem I, supra,* 507 F.2d at 340-42 & nn.19 & 20.

And, although not requested to do so by either plaintiffs or defendants, the district judge included in the plaintiff class sentenced offenders incarcerated in Monroe County Jail. This was a clear abuse of discretion. Whatever constitutional right a sentenced offender may have to contact visitation—and we express no view on the issue—is primarily a matter of the Eighth Amendment's prohibition of cruel and unusual punishment. This question is fundamentally different from the due process right of the pretrial detainee to be subjected to no greater restrictions on his liberty than are necessary to ensure either his attendance at trial or the security of the institution in which he is held. *Wolfish v. Levi, supra,* 573 F.2d at 124-25; *Rhem I, supra,* 507 F.2d at 336 n.5.

8 Although denial of class certification is not an appealable order, *Gardner v. Westinghouse Corp.,* 98 S. Ct. 2451 (1978), Judge Burke's ruling on the motion for a preliminary injunction accords us jurisdiction under 28 U.S.C. § 1292(a)(1). We may, in our discretion, review the entire order appealed. *Sanders v. Levy,* 558 F.2d 636, 642-43 (2d Cir. 1976), *adhered to on point en banc,* 558 F.2d 646, 647-48 (2d Cir. 1977), *rev'd on other grounds sub nom. Oppenheimer Fund, Inc. v. Sanders,* 98 S. Ct.

denying class certification and direct the district court to grant the interim relief requested by plaintiffs.[9] To avoid further shuttling between this court and the district court, we shall also attempt to provide some guidance for the future conduct of the litigation.

2380 (1978); *General Motors Corp. v. City of New York*, 501 F.2d 639, 648 (2d Cir. 1974); *see San Filippo v. United Bhd. of Carpenters*, 525 F.2d 508, 513 (2d Cir. 1975).

The facts of this case strongly militate in favor of review. Both *Sanders* and *General Motors* stress that "[t]he guiding principle to inform the discretionary application of pendent [appellate] jurisdiction is whether review of the appealable order will involve consideration of factors relevant to the otherwise nonappealable order," 501 F.2d at 648; *accord*, 558 F.2d at 643. Here, as shown in Parts I and II of this opinion, the district court's rulings on both the preliminary injunction and class certification motions reflected the same fundamental error concerning the nature of the right to contact visits. Moreover, when this case was last before us, *Marcera v. Chinlund*, 565 F.2d 253 (2d Cir. 1977) (*per curiam*), we exercised our discretion in favor of reviewing the class determination. Considering our obligation to protect our mandate, it would make little sense to deny similar review now.

The dissent's citation of *Gardner*, *supra*, and *Coopers & Lybrand v. Livesay*, 98 S. Ct. 2454 (1978), is somewhat disingenuous. Not only did the Court in *Gardner* explicitly avoid reaching the jurisdictional issue now confronting us, 98 S. Ct. at 2453 n.3, but the factors supporting the rejection of the death knell doctrine in *Coopers & Lybrand* have little relevance to the instant case. Thus, the administrative difficulties inherent in permitting appellate jurisdiction to turn on delicate factual determinations, 98 S. Ct. at 2460-61, are not present where, as here, jurisdiction already exists under § 1292(a)(1). Moreover, motions for preliminary relief themselves entail "considerations that are 'enmeshed in the factual and legal issues comprising *[sic]* the plaintiff's cause of action,'" *id.* at 2458 (quoting *Mercantile Nat'l Bank v. Langdeau*, 371 U.S. 555, 558 (1963)). Pendent review of a class determination involving the same issues, therefore, would be a wise and time-saving exercise of our discretion.

9 Neither Marcera nor Dillman is currently an inmate of the Monroe County Jail. Nevertheless, because a proper plaintiff class exists, the action is not moot. *Marcera v. Chinlund*, *supra*, 565 F.2d at 255 (citing *Gerstein v. Pugh*, 420 U.S. 103, 110 n.11 (1975)).

I. The Constitutional Framework

As we noted earlier, we have repeatedly held that it is unconstitutional to deny inmates regular contact visits while they are incarcerated awaiting trial. This right is founded on the bedrock of our criminal jurisprudence: an individual accused of a crime is presumed innocent, and may not be punished, until a jury finds him guilty beyond a reasonable doubt. Accordingly, pretrial detainees may be subjected only to those restraints on their liberty that inhere in the confinement itself or are clearly justified by the "compelling necessities of jail administration." *E.g.*, *Wolfish v. Levi*, *supra*, 573 F.2d at 124.

Moreover, it is equally well established that these "compelling necessities" do not include cost or mere administrative inconvenience, for "[i]nadequate resources [or] finances can never be an excuse for depriving detainees of their constitutional rights," *Detainees of Brooklyn House of Detention v. Malcolm*, 520 F.2d 392, 399 (2d Cir. 1975). *Accord*, *Rhem II*, *supra*, 527 F.2d at 1043-44; *see, e.g.*, *Wolfish v. Levi*, *supra*, 573 F.2d at 124; *Todaro v. Ward*, 565 F.2d 48, 54 n.8 (2d Cir. 1977). To be sure, the legitimate and vital interests of jail security may be protected, but only by rules carefully tailored to cause no more restriction of inmates' rights than essential. Thus, reasonable classification schemes, designed to weed out those detainees who would present intolerable security risks if granted contact visits, are permissible. *Rhem I*, *supra*, 507 F.2d at 338; 371 F. Supp. at 626; *see id.* at 603-04, 617-20. Blanket prohibitions, however, are banned. *See Rhem II*, *supra*, 527 F.2d at 1043; *Miller v. Carson*, 563 F.2d 741, 748-49 (5th Cir. 1977); *Detainees of Brooklyn House of Detention v. Malcolm*, 421 F. Supp. 832 (E.D.N.Y. 1976). In sum, it is too late in the day to sug-

gest that it does not offend the Constitution not to permit pretrial detainees contact visits. Judge Burke clearly erred in finding that plaintiffs suffered no irreparable injury and were unlikely to succeed on the merits, and his failure to award effective interim relief was thus an abuse of discretion. The true issues on this appeal concern not the right to relief but the scope of relief; not whether to enter an injunction but against whom and to what extent.

II. Class Certification

We turn, therefore, to the district court's rulings on the class certification motions. Under Fed. R. Civ. P. 23, of course, a moving party must demonstrate that the putative class not only meets each of the four criteria of subsection (a) but also fits one of the three categories set forth in subsection (b). *See, e.g., Green v. Wolf Corp.*, 406 F.2d 291, 298 (2d Cir. 1968), *cert. denied*, 395 U.S. 977 (1969). These twin requirements apply equally to plaintiff and defendant classes. *See, e.g., Research Corp. v. Pfister Associated Growers, Inc.*, 301 F. Supp. 497 (N.D. Ill. 1969), *appeal dismissed sub nom. Research Corp. v. Asgrow Seed Co.*, 425 F.2d 1059 (7th Cir. 1970); Note, *Defendant Class Actions*, 91 Harv. L. Rev. 630, 633 (1978). In this case, however, there is an additional hurdle to overcome. Unless the custodians of the 42 affected jails outside Monroe County are members of a proper defendant class, it would be an exercise in futility to define the plaintiff class to include detainees in counties other than Monroe. Indeed, because there is surely no case or controversy between Sheriff Lombard and non-Monroe detainees, to certify a statewide plaintiff class and not a corresponding defendant class would violate Article III as well. *See generally Develop-*

ments in the Law—Class Actions, 89 Harv. L. Rev. 1318, 1460-63 & nn.47 & 48 (1976) (citing cases). Thus, we first consider Judge Burke's refusal to certify a defendant class.

A. *Defendant Class*

There is little doubt that the 43 sheriffs constitute a group sufficiently large to meet the numerosity requirement of Rule 23 (a)(1). *See* 1 H. Newberg, *Class Actions* 171-76 (1977), and cases collected therein. Moreover, the constitutionality of denying contact visits is a "question of law . . . common to the class" of sheriffs within the meaning of 23(a)(2). And although a literal reading of the rule might indicate otherwise, *see* Note, *Federal Rules of Civil Procedure 23: A Defendant Class Action with a Public Official as the Named Representative*, 9 Val. L. Rev. 357, 390-96 (1975), it is now settled that 23(b)(2) is an appropriate vehicle for injunctive relief against a class of local public officials. *E.g., Lee v. Washington*, 390 U.S. 333 (1968) (*per curiam*), *aff'g* 263 F. Supp. 327 (M.D. Ala. 1966) (3-judge court); *Lynch v. Household Finance Corp.*, 360 F. Supp. 720 (D. Conn. 1973) (3-judge court); Note, *supra*, 9 Val. L. Rev. at 391 & n.128; Note, *Defendant Class Actions, supra*, 91 Harv. L. Rev. at 634.[10] The propriety of certifying a defendant class in this case depends, therefore, on whether

10 We recognize that this case is not precisely congruent to the usual suit against a class of local public officials. Plaintiffs here are not attacking the facial validity of a locally administered statute of statewide effect, *see, e.g., Washington v. Lee*, 263 F. Supp. 327 (M.D. Ala. 1966) (3-judge court), *aff'd per curiam*, 390 U.S. 333 (1968), but rather a series of similar administrative practices. Nevertheless, the distinction is immaterial under the facts of this case. The challenged behavior of the 43 sheriffs—denial of contact visitation—is identical; it could not be more so were they acting pursuant to statute rather than their own administrative policies. Since declaratory and injunctive relief is sought against identical behavior, we conclude that this case is a proper (b)(2) defendant class action.

Sheriff Lombard's defenses are typical of those of the class, and whether he can adequately protect the interests of the absentee sheriffs. Not surprisingly, Lombard has vigorously asserted that he passes neither test, and the district court agreed. We conclude, however, that the sheriff's defenses are indeed typical of those of his colleagues, and that he will continue to protect their interests as firmly and vigorously as he has in the litigation thus far.

1. Typicality of Defenses

Lombard presents two interrelated defenses. He asserts, first, that contact visits pose an intolerable threat to the security of the Monroe County Jail. In addition, he contends that any security arrangements he could make that would provide adequate protection against the twin evils of inmate violence and introduction of contraband would require him to spend money he does not have and has no hope of obtaining.

There can be little question that these defenses are familiar and, indeed, are always put forward as justification for denials of contact visits. The demons cost, violence, and contraband have been evoked in every reported contact visitation case. *See, e.g., Rhem I, supra; Miller v. Carson, supra,* 563 F.2d at 748-49; *O'Bryan v. County of Saginaw, Mich.,* 437 F. Supp. 582, 595, 598-99 (E.D. Mich. 1977). Moreover, Lombard has not cited, nor have we discovered, a single case in which a corrections official raised a defense other than those advanced here. In any event, we need not speculate as to possible defenses the sheriffs might raise, for there is hard evidence available on the matter. Fifty-one of New York's sheriffs joined in bringing the *McNulty* action to enjoin enforcement of the State Correction Commission's contact visitation regula-

tions, and the principal grounds they asserted were cost and security. *See* 406 N.Y.S.2d at 561.[11]

Lombard contends, nevertheless, that a single sheriff's defenses cannot possibly be typical of the entire class because of the substantial variations among detention facilities with respect to architecture, staffing, and inmate population. How, he asks, can the problems of Monroe County Jail—a modern, urban, maximum-security installation with a capacity of 325 inmates—be comparable to those of the small jails in rural counties such as Wyoming? The short answer to this argument is that it is the settled law of this Circuit that considerations of cost, architecture, or administrative convenience are simply insufficient to justify blanket denials of contact visits. *See* Part I *supra*. The size of the county and the nature of its jail are therefore irrelevant to the issue of liability. And although, as we discuss in Part III *infra,* these considerations may be significant in fashioning a decree, it is solidly established that a possible need for individual relief should not deter a court from certifying a class at that stage of the proceedings when the court is engaged only in resolving the merits of the plaintiffs' claims. *See, e.g., Green v. Wolf Corp., supra,* 406 F.2d at 300-01; *Samuels v. University of Pittsburgh,* 538 F.2d 991 (3d Cir. 1976) (Clark, J.); *In re Master Key Antitrust Litigation,* 70 F.R.D. 23 (D. Conn. 1975), *appeal dismissed,* 528 F.2d 5 (2d Cir. 1976). This principle is by no means limited to

11 In addition, the sheriffs argued that under the New York Constitution and various state statutes, the Corrections Commission was without authority to issue the regulations it did. *See* 406 N.Y.S.2d at 558. These claims are clearly irrelevant to the federal constitutional issues presented in the instant case, for a state may not violate an individual's due process rights with impunity merely by dispersing authority among its officials in such a way that no one has the power under state law to remedy the violation.

plaintiff classes. *See In re Gap Stores Securities Litigation,* 79 F.R.D. 283 (C.D. Cal. 1978); *United States v. Trucking Employers, Inc.,* 75 F.R.D. 682, 689 n.2 (D.D.C. 1977). Should the need to restructure the litigation arise in later stages, subsections (d) and (c)(4) of Rule 23 provide the trial judge with ample discretion to respond flexibly. We conclude, therefore, that the differences among jails do not render the cost and security defenses raised by Sheriff Lombard atypical of those of his class.

2. Adequacy of Representation

In contrast with representatives of plaintiff classes, named defendants almost never choose their role as class champion—it is a potentially onerous one thrust upon them by their opponents. *See generally* Note, *supra,* 91 Harv. L. Rev. at 648-50. It is not surprising, therefore, that Lombard opposes certification on the ground that, as an unwilling representative, he is unlikely to protect the interests of absentees. But courts must not readily accede to the wishes of named defendants in this area, for to permit them to abdicate so easily would utterly vitiate the effectiveness of the defendant class action as an instrument for correcting widespread illegality. Rule 23(a)(4) does not require a willing representative but merely an adequate one. It will often be true that, merely by protecting his own interests, a named defendant will be protecting the class. Where, as here, the legal issues as to liability are entirely common to members of the defendant class, there is little reason to fear unfairness to absentees. *See* Note, *supra,* 91 Harv. L. Rev. at 643-44. In this litigation, Sheriff Lombard has vigorously and ably defended a difficult position. A measure of his resourcefulness as an advocate for the class is the fact

that today—more than two years after this suit was commenced and in the face of clear and controlling cases to the contrary—the 43 county jails are still pursuing the visitation policies of their choice. Under these circumstances, his opposition to certification merits only "token weight." *Research Corp. v. Pfister Associated Growers, Inc., supra,* 301 F. Supp. at 499. We believe, therefore, that the district court erred in denying the motion to certify the statewide defendant class.

B. *Plaintiff Class*

We may dispose of the remaining certification issue briefly. In certifying a limited plaintiff class, the district court clearly found that the requirements of Rule 23(a) were met as to the class of Monroe County inmates. We agree.[12] Moreover, it is well established that civil rights actions are the paradigmatic 23(b)(2) class suits, for they seek classwide structural relief that would clearly redound equally to the benefit of each class member. *See, e.g., Alliance to End Repression v. Rockford,* 565 F.2d 975, 979 n.9 (7th Cir. 1977); Notes of Advisory Committee on Rules, 39 F.R.D. 69, 102 (1966); 1 H. Newberg, *supra,* at 240. But we do not agree with the district court that the putative unfamiliarity of the plaintiff class attorneys with jails outside Monroe County should prevent certification

12 We are not unmindful that when an action has become moot to the named plaintiffs, *see* note 9 *supra,* Article III's case or controversy requirement imposes on us a heightened duty to ensure that the case will be prosecuted vigorously. *Cf. Sosna v. Iowa,* 419 U.S. 393, 403 (1975). But where, as here, the class attorneys are experienced and able public interest lawyers, that duty is easily met. The very *raison d'être* of the Monroe County Legal Assistance Corp. is to bring suits of this nature, and it is clear that counsel have a continuing and abiding interest in the success of this litigation. Compare *Gerstein v. Pugh,* 420 U.S. 103, 110 n.11 (1975) (public defenders).

of a statewide plaintiff class. We have already held that variations among jails are irrelevant to liability, and, even with respect to relief, the record already contains some evidence concerning non-Monroe County jails. Discovery of absentee class members, *see United States v. Trucking Employers, Inc.*, 72 F.R.D. 101, 104-05 (D.D.C. 1976), is available to fill what gaps remain. Accordingly, the district court should have granted the plaintiffs' motion for certification of a statewide plaintiff class.

III. Relief

In considering the relief to be awarded the plaintiff class, we are mindful that there are compelling reasons for federal courts not to become enmeshed in the minutiae of day-to-day prison administration. Both the Supreme Court, in *Procunier v. Martinez*, 416 U.S. 396, 404-05 & n.9 (1974), and we in *Wolfish v. Levi, supra*, 573 F.2d at 124, have recognized that "courts are ill equipped to deal with the increasingly urgent problems of prison administration and reform," 416 U.S. at 405. And where, as here, the litigation affects a substantial proportion of a state's jail facilities, we must be particularly sensitive to the dictates of federalism. Federal courts must not become surrogate Jail Superintendents for the State of New York.

Nevertheless, we have repeatedly and firmly declared that neither convenience of judicial administration nor concern for the delicacies of federal/state relations will excuse a failure to remedy clear constitutional violations. *E.g., Wolfish, supra*, 573 F.2d at 124; *Todaro v. Ward, supra*, 565 F.2d at 53-54. The judgment in this action

must be adequate to redress the patently unconstitutional visiting procedures pursued by the defendant class.[13]

On this appeal, however, we are not in a position to direct entry of a final decree. The record clearly establishes the existence of constitutional violations by the defendant sheriffs, but it also suggests that there may be significant differences among the jails in architecture, staffing, and inmate population. Although these differences were irrelevant to the issue of liability, they assume importance in considering appropriate remedies, which may involve architectural changes, adjustments to security systems, and timetables for implementation. Recognizing that the persons best placed to determine how contact visitation should be implemented are the sheriffs themselves, plaintiffs asked that the district court preliminarily require submission of plans by each member of the defendant class. We believe this is appropriate, and the district court should grant this relief upon receipt of our mandate. The Corrections Commission has repeatedly

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13 It may be argued that we should not grant relief without first affording notice to the sheriffs. We conclude, however, that prior notice is required by neither Rule 23 nor the due process clause. Rule 23 does not require notice to (b)(2) plaintiff classes, *Sosna v. Iowa*, 419 U.S. 393, 397 n.4 (1975); *Frost v. Weinberger*, 515 F.2d 57, 65 (2d Cir. 1975) (Friendly, J.), *cert denied*, 424 U.S. 958 (1976), and the text of the rule does not differentiate between plaintiff and defendant classes on the issue of notice. Moreover, due process permits binding absentees to a judgment with respect to common questions of law if they have been adequately represented in the suit. *Hansberry v. Lee*, 311 U.S. 32 (1940). In the class action context, notice is simply a means for assuring such adequacy, not an end in itself. Note, *supra*, 91 Harv. L. Rev. at 646 n.86. Here, representation of the defendant class has been more than adequate, and the substantive law governing the case is clear. Thus, we are persuaded by *Lynch v. Household Finance Corp.*, 360 F. Supp. 720, 722 n.3 (D. Conn. 1973) (3-judge court), that notice of the preliminary injunction to be entered on remand is sufficient under the facts of this case.

offered technical assistance to counties implementing contact visits, and we trust that such aid is still available.[14]

Once the plans are submitted, the district court must determine whether the suit should continue to be maintained as a class action. Decertification under subsections (d) and (c)(4)(A) of Rule 23 is permissible if it appears that highly individualized relief is necessary in each county. The district court, however, ought not to take such action without considering all the alternatives, for there may be no need for extensive litigation with respect to each plan.

First, the district judge should consider any plan offering to implement contact visitation within one year. If he concludes that the proposal will in fact meet constitutional standards, the county submitting it should be permitted to have a consent decree entered embodying the offer. Even if the plans offered by the sheriffs do not resolve the litigation, there may be no need to fragment the lawsuit. It may be that formulation of relief against all the defendants will require only a small number of decrees. Useful models are provided by the Corrections Commission's abortive 1976 regulations and by the decrees issued in prior contact visitation cases, both in this Circuit and elsewhere. And documents produced in connection with the deposition of Chairman Chinlund of the State Corrections Commission indicate that the counties that established contact visitation programs in response to the Commission's 1976 regulations encoun-

14 We do not believe such assistance is barred by the terms of the preliminary injunction entered in the state court *McNulty* action, for that decree merely precluded implementation of the Commission's jail regulations and did not, as we read it, purport to limit the Commission's statutory authority to provide technical aid to administrators of corrections facilities. N.Y. Corrections Law § 45(2), (11) (McKinney Supp. 1978).

tered little difficulty, either in effecting the change or in maintaining security thereafter.[15] Indeed, it is highly significant that, as Chairman Chinlund testified, the facilities already permitting contact visitation are typical, in terms of architecture, location, and other relevant factors, of the full spectrum of New York State's county jails. Pleas of special circumstances or extraordinary hardship, therefore, should be examined with care before it is concluded that decertification is warranted.

We are somewhat distressed with both the tone and content of our Brother Van Graafeiland's dissent in an area charged with so much emotion. Elsewhere in this opinion we have responded to several of his complaints, and we will not repeat them here. We note, however, that much of the dissent is a transparent attempt to set up straw men by altering today's holding. For example, whether pretrial detainees have a right to conjugal visits has not been presented to us, nor was that issue before us in *Wolfish, supra*. But, its mere mention is more likely to inflame than shed light. We believe it neither helpful nor relevant to the final solution of these difficult issues, involving intensified feelings, to resort to this type of argument. What is before us is the right of prisoners who

15 Even in Monroe County, where Sheriff Lombard testified to an estimated cost of $750,000 for implementation of contact visitation, other evidence suggests that the price could be far less. All that may be required may be to remove the wall bisecting the current visiting area, purchase a few articles of electronic security equipment, and make a modest addition to the security staff.

We note in passing that our dissenting brother has misstated the record on this point. Judge Burke did not find that the price tag for implementing contact visitation in Monroe County would be $750,000; rather, he merely noted the sheriff's "rough estimate" to that effect. Finding of Fact 8, Jt. App. 177. The sheriff's estimate is hardly binding on us under the "clearly erroneous" rule of Fed. R. Civ. P. 52(a).

have not been convicted of a crime to *contact* visits—physical contact "in a manner consistent with reasonable standards of public decency," N.Y. Codes, Rules & Regs. § 7008.6. The law of this Circuit regarding these visits is clear.

Moreover, it is hardly correct for the dissent to suggest that we do not provide the district court with sufficient guidance to carry out our mandate. A glance at both Part III of this opinion and the Appendix will demonstrate that, if anything, we erred on the side of over-inclusion, for we wished to provide Judge Burke the maximum possible assistance in managing the future stages of this litigation. In particular, we call attention to Part 7008.8 of the Corrections Commission regulations, printed in the Appendix. This regulation specifically addresses detainee classification schemes and the procedures for implementing them, and it provides a reasonable balance between detainees' rights and "the compelling necessities of jail administration," *Wolfish, supra*, 573 F.2d at 124. Whether the district court, aided by the parties, adopts Part 7008.8 *in toto* or not at all, we have hardly left it stranded in the wilderness without a compass.

The order of the district court is vacated[16] and the cause is remanded with instructions (a) to certify plaintiff and defendant classes as defined herein, (b) to enter the preliminary injunction requested by the plaintiffs, and (c) to conduct further proceedings in accordance with this opinion.

16 This disposes of the cross-appeal by Sheriff Lombard as well as the principal appeal by plaintiffs.

APPENDIX:

New York Codes, Rules And Regulations, Part 7008

7008.1 Policy. (a) All prisoners confined in local correctional facilities are entitled to receive periodic visits.

(b) Consistent with the requirements of this Part, visits shall be permitted upon the request of a prisoner or a prospective visitor with the prisoner's consent.

7008.2 Visiting area. (a) A visiting area of sufficient size to meet the requirements of this Part shall be established and maintained in each facility.

(b) The visiting area shall be designed so as to allow physical contact between prisoners and their visitors.

7008.3 Availability of visits. (a) Each prisoner shall be entitled to at least two one hour visits each week.

(b) At least one visit each week shall be available to each prisoner between the hours of 9 a.m. and 5 p.m. on a weekday.

(c) At least one visit each week shall be available to each prisoner:

(1) between the hours of 5 p.m. and 9 p.m. on a weekday; or

(2) on a Saturday or Sunday at times not unduly disruptive of facility routine.

(d) Prisoners shall be permitted to visit with more than one visitor at the same time, with the maximum number of visitors to be determined by the chief administrative officer.

(e) Visitors shall be permitted to visit with more than one prisoner at the same time with the maximum number of prisoners to be determined by the chief administrative officer.

7008.4 Initial visit. (a) Each prisoner shall be entitled to receive a visit within 24 hours after his admission to a facility.

(b) If a visiting period scheduled pursuant to subdivisions (b) and (c) of section 7008.3 of this Part is not available within 24 hours after a prisoner's admission, arrangements shall be made to ensure that the initial visit required by subdivision (a) of this section is made available.

7008.5 Visitor identification and registration. (a) Consistent with the requirements of this Part, any properly identified person shall, with the prisoner's consent, be permitted to visit that prisoner.

(b) As used in this section, the term "properly identified person" shall mean a person who presents adequate proof as to his identity.

(c) Each visitor shall be required to enter in a facility visitors log:

(1) his name;

(2) his address;

(3) the date;

(4) the time of entry;

(5) the name of the prisoner or prisoners to be visited; and

(6) the time of exit.

(d) Any prospective visitor who is under 16 years of age shall be required to enter in the facility visitors log:

(1) the information required in subdivision (c) of this section;

(2) his age; and

(3) the name, address, and telephone number of his parents or legal guardian.

(e) Prior to visiting a prisoner, a prospective visitor under 16 years of age may be required by the chief administrative officer to produce written permission from a parent or legal guardian approving such visit. In the discretion of the chief administrative officer, oral permission from a parent or legal guardian of a prospective visitor under 16 years of age may be accepted.

7008.6 Contact visits. (a) Physical contact shall be permitted between a prisoner and his visitors.

(b) Prisoners and their visitors shall be required to conduct themselves in a manner consistent with reasonable standards of public decency.

7008.7 Visitation security and supervision. (a) All prisoners, prior and subsequent to each visit, may be searched solely to ensure that they possess no contraband.

(b) All prospective visitors may be searched solely to ensure that they possess no contraband.

(c) Any body search of a prospective visitor made pursuant to subdivision (b) of this section shall be conducted only through the use of electronic detection devices.

(d) Personal effects, including but not limited to handbags or packages possessed by any prospective visitor, shall be searched or checked with the visiting area supervising officer.

(e) A search of the visiting area shall be conducted prior and subsequent to each visiting period.

(f) Supervision shall be provided during visits solely to ensure that the safety, security or good order of the facility is maintained.

(g) Supervision of visits shall not include any surreptitious surveillance.

7008.8 Limitation of visitation rights. (a) Visitation rights shall not be denied, revoked, or limited based solely upon a prisoner's or prospective visitor's:

(1) sex;
(2) sexual orientation;
(3) race;
(4) age, except as otherwise provided in this Part;
(5) nationality;
(6) political beliefs;
(7) religion;
(8) criminal record; or
(9) the prospective visitor's involvement in any pending civil or criminal proceeding.

(b) The visitation rights of a prisoner with a particular visitor may be denied, revoked or limited only when it is determined that the exercise of those rights constitutes a threat to the safety, security or good order of a facility.

(c) A prisoner's right to contact visits as provided for in section 7008.6 of this Part may be denied, revoked, or limited only when it is determined that such visits constitute a threat to the safety, security or good order of a facility. Should a determination be made to deny, revoke or limit a prisoner's right to contact visits, alternative arrangements for affording the prisoner visits shall be made, including but not limited to non-contact visits.

(d) A prisoner's visitation rights as provided for in sections 7008.3 and 7008.4 of this Part may be denied, revoked or limited in an emergency situation. Within 24 hours after any denial, revocation or limitation made pursuant to this subdivision, the chief administrative officer must apply to and obtain the approval of the State Commission of Correction to continue such action.

(e) The provisions of Part 7006 of this Subtitle [Discipline] shall apply prior to any determination made pursuant to subdivisions (b) and (c) of this section.

(f) Any determination to deny, revoke or limit a prisoner's visitation rights pursuant to subdivisions (b) and (c) of this section shall be made by the chief administrative officer in writing and shall state the specific facts and reasons underlying such determination. A copy of this determination shall be given to any person affected by the determination.

(g) Any person affected by a determination made pursuant to subdivisions (b) and (c) of this section may appeal such determination to the citizens policy and complaint review council of the State Commission of Correction.

(1) The person affected by the determination shall give notice in writing to the council and the chief administrative officer of his intent to appeal the determination.

(2) Upon receiving any notice of appeal made pursuant to this section, the chief administrative officer shall immediately forward to the council the written determination at issue.

(3) The chief administrative officer or any person affected by the determination may submit to the council for their consideration any additional material.

(4) The council or its designate shall issue a written decision upon the appeal within 14 days after they have received notice of the requested review.

VAN GRAAFEILAND, *Circuit Judge,* dissenting:

Once again, this Court, after espousing the doctrine that courts are ill-equipped to deal with the problems of prison administration and that they must not become "surrogate Jail Superintendents for the State of New York", has proceeded virtually as if the doctrine did not exist. My brothers now mandate a district judge sitting in Rochester, New York, to undertake the implementation of a "contact" visitation program in the jails of forty-three counties throughout the State of New York. Expense is to be no deterrent. Whatever the cost to the citizens of these counties, the district court must order it to be incurred. As the majority put it, "[i]nadequate resources or finances can never be an excuse for depriving detainees of their constitutional rights."

At the outset, I question whether this Court should become involved in the matter of class certification at the present time. During the past year, the Supreme Court has held that the rule denying the appealability of class certification orders should not be circumvented by allowing review under the "death knell" doctrine, *Coopers & Lybrand v. Livesay,* 46 U.S.L.W. 4757 (June 21, 1978), or by equating the denial of certification with the denial of interlocutory injunctive relief. *Gardner v. Westinghouse Broadcasting Co.,* 46 U.S.L.W. 4761 (June 21, 1978). It is equally important, I believe, that the rule not be emasculated by the simple device of coupling every request for class certification with a motion for preliminary injunctive relief under the doctrine of pendent jurisdiction when the appeal from the preliminary injunction order comes up as a matter of right under 28 U.S.C. § 1292(a)(1).

On some occasions, this Court has reviewed nonappealable orders by exercising pendent jurisdiction. *See*

Sanders v. Levy, 558 F.2d 636, 643 (2d Cir. 1976), *rev'd on other grounds sub nom. Oppenheimer Fund, Inc. v. Sanders,* 46 U.S.L.W. 4724 (June 19, 1978). On other occasions, it has refused to do so. *See General Motors Corp. v. City of New York,* 501 F.2d 639, 648 (2d Cir. 1974). Because of the danger of abuse in the pendent jurisdiction method of review, *see Garner v. Wolfinbarger,* 433 F.2d 117 120 (5th Cir. 1970); 16 Wright & Miller, *Federal Practice and Procedure* § 3937 at 270-71 (1977), it is a procedural device that should rarely be used. *Id.* at 271. In *Abney v. United States,* 431 U.S. 651, 662-63 (1977), the Court recognized the possibility of abuse in holding that interlocutory appellate consideration of the district court's rejection of a double jeopardy claim did not permit the Court of Appeals to consider other claims of error included in the defendant's motion to dismiss.

In disagreeing with my brothers, I need not decide whether *Abney's* stringent holding should be followed in a civil action. I am content to suggest that we should rarely exercise pendent jurisdiction to review nonappealable orders. I am also content to follow the firmly established doctrines that the determination of whether an action should proceed as a class action "is one which is peculiarly within the discretion of the trial judge", *Becker v. Schenley Industries, Inc.,* 557 F.2d 346, 348 (2d Cir. 1977), and that the trial judge's findings of fact should not be overruled unless clearly erroneous. *Palermo v. Warden,* 545 F. 2d 286, 293 (2d Cir. 1976), *cert. dismissed,* 431 U.S. 911 (1977).[1] With all respect to my

1 Without belaboring the matter, I point out that the district court made factual findings that Sheriff Lombard was not representative of all the sheriffs and would not adequately represent them and that the two young lawyers seeking to represent the plaintiff class would not adequately do so.

learned colleagues, I fear that they are as ready to abandon these valuable precepts of appellate review as they are to ignore their professed sensitivity to the dictates of federalism. For the foregoing reasons, and those which follow, I respectfully dissent.

It seems to me that, before we set the district judge to the formidable task of restructuring jails in forty-three counties, we should first define clearly and explicitly the nature of the legal right upon which this extraordinary relief is based. A class action to enforce an undefined and indefinite right is a waste of judicial manpower and taxpayers' money.[2] My brothers should start by stating exactly what they mean by the term "contact visit."

This Court has firmly committed itself to the proposition that pretrial detainees have a constitutional right to "contact visits", without ever really stating how much contact there must be in such visits to satisfy the mandates of the Constitution. *See Wolfish v. Levi,* 573 F.2d 118 (2d Cir. 1978), *cert. granted sub nom. Bell v. Wolfish,* 47 U.S.L.W. 3221 (Oct. 2, 1978) (No. 77-1829). *Rhem v. Malcolm,* 507 F.2d 333 (2d Cir. 1974) and 527 F.2d 1041 (2d Cir. 1975). If we are now going to regulate this aspect of jail management, the time has come to lay the cards on the table.

Pretrial detainees, we have said, are presumed to be innocent and therefore have the same rights as unincarcerated persons, except where the exercise of those rights is prohibited by the requirements of jail security. *Rhem v. Malcolm, supra,* 507 F.2d at 336. The pretrial detainee is to be subjected "to no greater restrictions on his liberty

2 Unlike the court in *Washington v. Lee,* 263 F. Supp. 327 (M.D. Ala. 1966), *aff'd,* 390 U.S. 333 (1968), we are not dealing here with a simple issue, such as a statute requiring racial segregation in prisons and jails.

than are necessary to ensure either his attendance at trial or the security of the institution in which he is held." Majority opinion, footnote 7. The unincarcerated man has, of course, the right to "kiss a wife or to fondle a child." But he has more than that. He has the right to kiss a child and to fondle a wife, and he has the right to do so in privacy. *See Griswold v. Connecticut,* 381 U.S. 479 (1965). Do our forceful statements mean that a presumptively innocent pretrial detainee is entitled to the same conjugal "contact" rights that he would enjoy were he not incarcerated, so long as the exercise of these rights does not cause a breach in jail security? If, as we hold, pretrial detainees retain "all the rights of an ordinary citizen except the right to go and come as they please", *Rhem v. Malcolm, supra,* 507 F.2d at 337 (quoting *Jones v. Wittenberg,* 323 F. Supp. 93, 100 (N.D. Ohio 1971), *aff'd sub nom. Jones v. Metzger,* 456 F.2d 854 (6th Cir. 1972)), can the private and intimate contact rights of ordinary citizens be taken from the detainees without a compelling security reason? The only thing preventing the exercise of these rights within jail confines is cost. Extra rooms can be built, and more guards can be hired. This requires money, but the lack of money, we say, does not justify depriving pretrial detainees of their rights under the Constitution.

I do not know whether it would be wise to order that the citizens of New York be given complete physical access to their presumptively innocent spouses who are awaiting trial in jail. I would prefer to leave that decision to the officials of the New York correctional system, who are more knowledgeable than I in the field of penology.[3]

3 Penal authorities in several countries permit prisoners to continue conjugal relationships with their spouses. *See* Jacobs. &

However, wisdom and judicial concepts of constitutionality do not always go hand in hand. My brothers have decreed that the constitutional rights of pretrial detainees are, except for security reasons, the same as those of men who are not imprisoned. Having proclaimed that to be the law, my brothers should now declare whether the pretrial detainees' constitutional rights to "contact with their loved ones" are the same "contact" rights they would have if they were not imprisoned. The people of Monroe County and New York State are entitled to know this now, not to learn about it in installments. Moreover, Judge Burke should be provided with guidance if he is to attempt to carry out the mandate of this Court.

Carrying out this Court's mandate will not be a simple and inexpensive matter. For example, at the same time my brothers hold the right to contact visits to be "founded on the bedrock of our criminal jurisprudence", they say that pretrial detainees can be deprived of this valuable constitutional right through "classification" schemes designed by jail officials to weed out security risks. They do not explain how state officials can create a workable "classification" scheme for a group of pretrial detainees, all of whom are presumed to be innocent, that will mark one as a security risk and not another.[4] They

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Steele, *Sexual Deprivation and Penal Policy*, 62 Cornell L. Rev., 289, 297-98 (1977). However, most American courts have not yet seen fit to treat this as a fundamental right for convicted prisoners. *See Wolfish v. Levi*, 439 F. Supp. 114, 142-43 (S.D.N.Y. 1977). This Court, at 573 F.2d 118, affirmed *Wolfish* in part and reversed it in part but held specifically that pretrial detainees have a First Amendment right to contact visits. *See id.* at 126 n. 16.

4 Although this Court has previously approved the use of a "classification" system, *see Rhem v. Malcolm, supra*, 507 F.2d at 338, it has never discussed the criteria to be considered in the creation of classes. I suggest that an attempt to classify detainees on the basis of their previous record, the nature of the crime

likewise do not state how the valuable constitutional right to contact visits can be taken from any detainee without the trappings of due process. *See, e.g., Cardaropoli v. Norton*, 523 F.2d 990, 994-97 (2d Cir. 1975); *Sostre v. McGinnis*, 442 F.2d 178, 196 (2d Cir. 1971), *cert. denied*, 404 U.S. 1049, 405 U.S. 978 (1972). Inevitably, the district court will become involved in the "minutiae" of jail administration as federal courts have done whenever they have undertaken to prescribe the constitutional rights of inmates. *See, e.g., Todaro v. Ward*, 565 F.2d 48 (2d Cir. 1977).[5]

I am satisfied, moreover, that the cost of implementing the majority's program in all the jails of New York will be high. I am more influenced than my brothers by the district court's finding that the cost of undertaking simply a "shake a friend's hand" and "kiss a wife" program in the Monroe County Jail would be $750,000, "$500,000 of which would be directly related to the cost of personnel and daily operation of such jail facility which would be a continuing and increasing cost."[6] If my brothers really mean it when they say that pretrial detainees are to be given "all the rights of the ordinary citizen except the right to come and go as they please", the cost of a state-

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with which they are charged, or some similar criteria, would result in so many exceptions as to make the entire scheme worthless. In the final analysis, a jail superintendent who would deprive a detainee of the right to contact visits must do so on the strength of his own honest belief that he is avoiding those "demons—violence and contraband."

5 When this Court holds, as it did in *Todaro*, that the Constitution requires nurses in a prison infirmary to make rounds every two hours, it is not exactly avoiding "minutiae".

6 Without even discussing the clearly erroneous rule, my brothers state that other evidence "suggests" that the price could be less.

wide program permitting the exercise of such rights will be astronomical.

This Court is now entering a new area of state prison regulation. We have made many broad and categorical statements about the rights of pretrial detainees. If we mean what we have said, let's bite the bullet and order appropriate relief. If we actually mean something less, let us confess to exaggeration. In either event, let the correctness of our decision be contested in an arena that does not encompass forty-three separate counties. If we are wrong in whatever constitutional interpretation we make, our error will not have disrupted unnecessarily all the jails in the State of New York.

APPENDIX D
Amendment of Mandate of United States Court of Appeals Second Circuit

UNITED STATES COURT OF APPEALS
SECOND CIRCUIT

At a Stated Term of the United States Court of Appeals, in and for the Second Circuit, held at the United States Court House, in the City of New York, on the twenty-eighth day of March, one thousand nine hundred and seventy-nine.

Present:

HONORABLE IRVING R. KAUFMAN,
Chief Judge.

HONORABLE J. JOSEPH SMITH

HONORABLE ELLSWORTH VAN GRAAFEILAND,
Circuit Judges.

JOSEPH MARCERA and JOHN DILLMAN, Individually and on behalf of all others similarly situated,
Plaintiffs-Appellants-Cross-Appellees,

v.

STEPHEN CHINLUND, JOSEPH WASSER, and DOROTHY WADSWORTH, Individually and in their official capacities as members of the New York State Commission of Correction,
Defendants-Appellees,

—and—

WILLIAM LOMBARD, Individually and in his official capacity as Sheriff of Monroe County and on behalf of all other persons similarly situated,
Defendant-Appellee-Cross-Appellant.

78-2081
78-2090

Appendix D — Amendment of Mandate of United States Court of Appeals Second Circuit

AMENDMENT OF MANDATE

Treating the letter of March 15, 1979, filed by counsel for the appellants as a motion to amend the mandate of this Court, it is hereby ordered that the slip opinion in the above case be amended as follows:

1. Delete "43" and substitute "42" in each of the following places:

page 1468, line 18;
page 1469, lines 6, 18;
page 1470, line 2 of footnote 6;
page 1474, line 5;
page 1474, line 8 of footnote 10;
page 1478, line 3.

2. On page 1473, line 24, delete "42" and substitute "41."

3. On page 1468, footnote 4, delete "Orange," from line 8 of the footnote, and add the following paragraph to the end of the footnote:

> "At the time the district court entered the order under consideration here, the sheriff of Orange County did not permit contact visitation in his jail. Since that time, however, a consent decree has been filed in another action that requires implementation of contact visitation in Orange County. *Merriweather* v. *Sherwood*, No. C.A. 77-3421 (E.W.), consent judgment at 36-39 (S.D.N.Y. Oct. 27, 1978). Accordingly, Orange County has been deleted from the definitions of the plaintiff and defendant classes."

/s/ IRVING R. KAUFMAN,
Irving R. Kaufman, *Chief Judge.*

/s/ J. JOSEPH SMITH
J. Joseph Smith

/s/ ELLSWORTH VAN GRAAFEILAND
Ellsworth Van Graafeiland
Circuit Judges.